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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1992

JACK PARDUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

VOLUME 1–PETITION

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May 17, 1993

QUESTIONS PRESENTED FOR REVIEW

I. The decision of the Court of Appeals is erroneous under *Jacobson v. United States* and *Sorrells v. United States*; there is no evidence whatsoever that petitioner was predisposed to commit the offense prior to the government's conduct designed to draw him into its "conspiracy."

II. The conduct of the government in using implied threats to get petitioner and his grandson to complete the acts they were indicted for constitutes outrageous government conduct which violates the due process clause.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the case below are: this petitioner, Jack Pardue (983 F.2d 843); his grandson Michel Pardue (983 F.2d 835); and his son David Pardue (983 F.2d 850).

Michel and David Pardue are proceeding *in forma pauperis*, and they are filing petitions for certiorari concurrently herewith.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on January 4, 1993. It is published as *United States v. Pardue*, 983 F.2d 843 (8th Cir.1993). It is reproduced in the Appendix at A-3. Petitioner's petition for rehearing and suggestion for rehearing en banc was denied on February 16, 1993. Appendix at A-16.

The district court's opinion was decided May 13, 1991, and it is published as *United States v. Pardue*, 765

F.Supp. 513 (W.D.Ark.1991). It is reproduced in the Appendix at A-34.

JURISDICTION

The Court of Appeals decided this case on January 4, 1993, and the petition for rehearing was denied on February 16, 1993.

This Petition for Writ of Certiorari is filed within ninety days and is, therefore, timely.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides that:

> . . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; . . . .

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 371 provides, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one of more of such persons do any act to effect the object of the conspiracy shall be fined not more that $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1958(a) provides as follows:

> Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with the intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt or, or as consideration for a promise or agreement to pay, anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined nor more than $20,000 and imprisoned for nor more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both.

STATEMENT OF THE CASE

This is a murder for hire conspiracy case. The defense is entrapment and outrageous governmental conduct. The petitioner (Jack Pardue) and his co-defendants son (David Pardue) and grandson (Michel Pardue) were convicted after a week long trial of conspiracy and interstate transportation for murder for hire (18 U.S.C. §§ 371 & 1958(a)).[1] The district court vacated the convic-

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[1] Petitioner and his grandson Michel were convicted of one count of interstate transportation to commit murder for hire, and they were acquitted of one count. David Pardue, petitioner's son and Michel's father, was convicted of both counts.

tions as to Jack and Michel on Rule 29 motions for judgment of acquittal and denied the motion as to David on May 13, 1991. *United States v. Pardue*, 765 F.Supp. 513 (W.D.Ark.1991) (reprinted in Appendix at A-34). Jack's role was that of the concerned grandfather trying to get his grandson out of a bad situation that the Government sucked his grandson into.

The government appealed. On January 4, 1993, the Eighth Circuit reversed, reinstating the convictions of Jack[2] and Michel[3] and affirming as to David.[4] As to Jack, the panel divided 2-1 with former Chief Judge Lay dissenting that Jack was entrapped as a matter of law. *United States v. Jack Pardue*, 983 F.2d 843, 848 (8th Cir.1993) (Lay, J., dissenting). On February 16, 1993, the panel denied each of the defendants' petitions for rehearing and suggestion for rehearing en banc. (Appendix at A-16) The facts as stated in the district court's opinion are substantially uncontradicted. The issue arises from application of the law to those uncontradicted facts.

A.

This case begins in April 1990 with plotting by one Gary Garrett, a professional agent provocateur, snitch, and

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[2] *United States v. Jack Pardue*, 983 F.2d 843 (8th Cir.1993) (reprinted in Appendix at A-3).

[3] *United States v. Michel Pardue*, 983 F.2d 935 (8th Cir. 1993) (reprinted in Appendix at A-17).

[4] *United States v. David Pardue*, 983 F.2d 850 (8th Cir. 1993). This opinion is not reprinted in the Appendix. It is reprinted in David Pardue's petition for certiorari.

prison inmate "who might be the most reprehensible character ever to testify before this court." *United States v. Pardue,* 765 F.Supp. 513, 515 (W.D.Ark. 1991) (Appendix at A-37) Garrett has a talent for using law enforcement agencies (not just individual agents) to get things for himself. He helped manufacture this crime and used the Pardues in an effort to get his freedom. *Id.* at 526 (Appendix at A-61).

David Pardue was mad at Bob Harrington. Harrington and he went on a crime spree together. He was involved with David in a robbery of a Wal-Mart store in Benton County, Arkansas in April 1987, but Harrington turned state's evidence and walked free. David ultimately was convicted of this robbery after a jury trial, and he was in prison, sentenced to five years. While there, he talked about Harrington, and he indicated a desire to have Harrington killed. *Id.* at 515 (Appendix at A-37). Inside prison, he talked with Garrett, and Garrett seized the moment realizing that David Pardue was his ticket out. Not content with trying to deliver just David, Garrett plotted how to bring down three generations of the Pardue family. *Id.* He talked with David Pardue to learn what he could about David's crime, the locale where it happened, and the players in the conviction. *Id.* at 516 (Appendix at A-38)

David was also charged with perjury in connection with his "defense" in the robbery case. He was set for trial on July 8, 1990. Harrington was to testify against him in that trial, too. Thus, David had a July 8th deadline for Harrington. David, however, pled guilty to perjury without putting the plan to "whack" Harrington in motion.

B.

This case ends with the machinations of the FBI and

the Benton County, Arkansas, authorities, particularly FBI Agent Gary Danzer, a 21-year veteran who played the role of the "hitman" in this case "well, so well, that the court believes that he exceeded the bounds of permissible police conduct." *Id.* at 527 (Appendix at A-63). Danzer had Jack and Michel Pardue convinced that he was a cold-blooded killer who would "whack" anyone for the right price, paid in advance, of course. *Id.* at 518, 519 (Appendix at A-43, A-46). He also made it absolutely clear that he had to answer to another person who would not be happy if he were not paid for the murder.[5]

Danzer was pushing, and the Pardues were unable to extricate themselves from Danzer's, Garrett's, and the FBI's scheme. They did the only thing that they could do, they stalled Danzer by telling him that they did not have the money. Michel agreed to meet with Danzer, effectively to get him off his back, but he made it clear that there would be no money for him and they were not going to do what Danzer was trying to get them to do. *Id.* at 519 (Appendix at A-43). Michel met with Danzer and put him off, and Danzer said to call him back if the Pardues' minds change. *Id.* at 519-20 (Appendix at A-46--A-47). Danzer made it clear that he may not be available later, and that further inquiries should be through Garrett in

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[5] *Id.* at 519 (Appendix at A-45):

> Toward the end of the conversation, still insisting that they meet that evening to view the money, Danzer explained his need to see the money by saying, "If I get somebody up here to, to help me then they're gonna want to kill me about the time I don't be able to come across with, do you understand what I'm saying? I got expenses and responsibilities."

prison. *Id.* at 528-29 (Appendix at A-68).

All is well. Danzer is gone, and there is no contact with the Pardues. In the meantime, the FBI is not content to let this go away.[6] There is a planning session at the FBI Office in Fayetteville, Arkansas where the federal and state authorities try to figure out how to breathe new life into this dead "conspiracy." The FBI manufactures some letters about the alleged contract killer and sends them. One was sent July 31, 1990. *Id.* at 529 (Appendix at A-68).

On September 16, 1990, about two months after disappearing, Danzer suddenly reappears on the telephone and tells Michel that David has authorized the murder. Michel tells Danzer not to call him. *Id.* at 521 (Appendix at A-50). On September 20th, Danzer calls back to state tell Michel that the murder happened and that he needs his money. *Id.*

Thus, as a part of the FBI plan, the professional "hitman" who made it crystal clear that he did not work on credit, claimed to have done the murders and expected his money. The FBI decided at this meeting to gain by intimidation what guile failed to produce for it. Michel and Jack were now scared that they had to come through with the money for this "killer" who has other, tougher guys to answer to, and they mailed the money to a post office box designated by Danzer.

C.

Thus, we have a crime that was generated in the mind

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[6] Garrett is also concerned about his own deal. He writes a letter on July 11, 1990 to the state prosecutor imploring them to deliver on their promise to him. *Id.* at 529 (Appendix at A-68).

of Gary Garrett, maybe with David Pardue. Garrett sold his plan to the FBI and Benton County, Arkansas authorities in exchange for his freedom. He worked David Pardue in prison, while Danzer worked Michel Pardue in Fayetteville. Jack Pardue was trying to get Michel out without getting themselves hurt. When Michel Pardue did not come along as he was supposed to, and the "conspiracy" that the government had going was dead because the Michel and Jack would not go along with the scheme to kill the Harringtons, the government devised a scheme to regenerate its dead conspiracy. Since the Pardues would not pay the money to kill the Harringtons voluntarily, the government decided to fake the killing and make the Pardues pay the money out of fear for their own safety, which they did.

With that, the jury convicted them even though there was no evidence of predisposition to commit the crime.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS CONTRARY TO *JACOBSON V. UNITED STATES* AND *SORRELLS V. UNITED STATES* BECAUSE THERE IS NO EVIDENCE WHATSOEVER OF PETITIONER'S PREDISPOSITION TO COMMIT THE CRIME.

A.

The decision below is contrary to *Jacobson v. United States*, 112 S.Ct. 1535 (1992) (which was decided nine months before the decision below[7]) and *Sorrells v. United States*, 287 U.S. 435 (1932). In *Jacobson*, this Court said, 112 S.Ct. at 1540-41:

> In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. *Sorrells, supra,* 287 U.S., at 442, 53 S.Ct., at 212; *Sherman, supra,* 356 U.S., at 372, 78 S.Ct., at 820. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government Agents. *United*

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[7] The case was argued below about five weeks after *Jacobson* was argued in this Court, and it was decided nine months after. The effect of *Jacobson* was discussed at oral argument.

States v. Whoie, 288 U.S.App.D.C. 261, 263-264, 925 F.2d 1481, 1483-84 (1991). (footnote omitted)

Here, the record is singularly devoid of any evidence that Jack Pardue was predisposed to commit any criminal offense prior to the "creative activity" of Danzer and Garrett. As the Court said in *Jacobson*, 112 S.Ct. at 1541 n. 2:

> The sole issue is whether the Government carried its burden of proving that petitioner was predisposed to violate the law *before* the Government intervened. The dissent is mistaken in claiming that this is an innovation in entrapment law and in suggesting that the Government's conduct prior to the moment of solicitation is irrelevant. See *post*, at 1544-1545. The Court rejected these arguments five decades ago in *Sorrells*, when the Court wrote that the Government may not punish an individual "for an alleged offense which is the product of the creative activity of its own officials" . . . . Indeed, the proposition that the accused must be predisposed prior to contact with law enforcement officers is so firmly established that the Government conceded the point at oral argument . . . . (emphasis in original)

The Court of Appeals makes no mention of Jack Pardue's predisposition. Instead, it talks of what the jury could have concluded that Michel and David might have done to enlist Jack in the plan. 983 F.2d at 847. It never discusses the fact that this all began because of the Government's planning and conduct. The very fact that the Court of Appeals relied to find "some evidence" to support a conviction of Jack occurred after Michel and

Jack had extricated Michel from Danzer's plan. *Id.*[8] The Court of Appeals stated that the evidence was in conflict.

In some metaphysical way, all evidence in every case is in conflict. That does not change the undisputed facts which point to only one conclusion. Here, there is no conflict on the material fact that there is no evidence of predisposition of Michel Pardue prior to Danzer's approaching Michel at the Varner Unit parking lot. And, Jack did not even know about it until the next day after Danzer had plied him with the tales of how Danzer was a professional killer there to do David Pardue's bidding.

This is a "crime" that would not have occurred but for the creative, insistent, and threatening efforts of FBI Agent Danzer. Neither Jack nor Michel was predisposed to

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[8] *Id.*:

> The tendered defenses of entrapment and coercion were likewise factual issues for the jury to resolve. Because the evidence was in conflict, it was for the jury to decide if Jack did what he did because he was predisposed to and willingly did so, or whether he did so because he was entrapped or out of fear for his and his family's lives. Where the facts as to entrapment are disputed, the issue must ordinarily be submitted to the jury. *Sorrells v. United States,* 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932); *Mathews v. United States,* 485 U.S. 58, 62, 108 S.Ct. 883, 886, 99 L.Ed.2d 54 (1988); *United States v. Crump,* 934 F.2d 947, 956 (8th Cir.1991); *United States v. Pfeffer,* 901 F.2d 654, 656 (8th Cir.1990); *United States v. Leroux,* 738 F.2d 943 (8th Cir.1984). Because the evidence in this case pointed to more than one reasonable conclusion, the district court was in error when it determined that Jack had been entrapped as a matter of law by the undercover agent.

commit the crime, and the evidence in this case does not even suggest the contrary.

B.

In this connection, the decision of the Court of Appeals is contrary to *United States v. McLernon,* 746 F.2d 1098, 1111-12 (6th Cir.1984). Resolving all doubts in the evidence in favor of the Government, there still is no evidence of predisposition.

C.

The facts of this case give the Court a clear fact situation to apply the holding of *Jacobson* to situations where the Government was not just enticing the petitioner into committing its crime; here it used implied threats to make petitioner to do the very act it indicted him for.

II. THE CONDUCT OF THE GOVERNMENT IN USING IMPLIED THREATS TO GET PETITIONER AND HIS GRANDSON TO COMPLETE THE ACTS THEY WERE INDICTED FOR CONSTITUTES OUTRAGEOUS GOVERNMENT CONDUCT WHICH VIOLATES THE DUE PROCESS CLAUSE.

A.

In *United States v. Mosley,* 965 F.2d 906, 909 (10th Cir.1992), the Tenth Circuit explained the outrageous conduct defense:

> The defense of outrageous conduct is distinct from the defense of entrapment in that the entrapment defense looks to the state of mind of the defendant to

determine whether he was predisposed to commit the crime for which he is prosecuted. *See Jacobson v. United States,* --- U.S. ---, 112 S.Ct. 1535, 1540, 118 L.Ed.2d 147 (1992). The outrageous conduct defense, in contrast, looks at the government's behavior. *See United States v. Gamble,* 737 F.2d 853, 858 (10th Cir.1984).

The outrageous conduct defense was first enunciated in *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). "[W]e may some day be presented with a situation in which the conduct of law enforcement agencies is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ." *Id.* at 431-32, 93 S.Ct. at 1643 (citing *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)). Several years later, in *Hampton v. United States,* 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), a majority of the Justices left open the possibility that an outrageous conduct defense based on the Due Process Clause might be invoke successfully even if the entrapment defense is unavailable because of predisposition. *Id.* at 495, 96 S.Ct. at 1653 (Powell, J., with Blackmun, J., concurring); *id.* at 496-97, 96 S.Ct. at 1653 (Brennan, J., with Stewart & Marshall, JJ., dissenting).

Notwithstanding the lack of a clear holding on outrageous conduct by the Supreme Court, must of the circuits, including this one, have recognized the viability of the outrageous conduct defense. . . .

Outrageous governmental conduct is a question of law not to be submitted to the jury. *Id.* at 909 & n.3.

The scope of this legal defense, however, has not been "defined . . . with any degree of precision." It revolves around the totality of the circumstances of any particular case with "reference to '"'the universal sense of justice.'"' *Id.* at 910 (citing *Russell,* 411 U.S. at 432 (quoting *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234, 246 (1960))).

B.

The district court found that the actions of the government were outrageous in twice pulling Michel and Jack Pardue into this "conspiracy" when the expressly were trying to get out. 765 F.Supp. at 531 (Appendix at A-73). The Court of Appeals disagreed in two paragraphs stating only that the defendant's burden on such an issue is "quite high," and that these defendants did not meet it. 983 F.2d at 847-48 (Appendix at A-10) It simply stated that the government "did not implant the criminal design in any of the Pardues." *Id.* at 848 (Appendix at A-10).

To the contrary, the government was solely responsible for Jack Pardue having anything to do with this "conspiracy." At the least, this case gives the Court the opportunity to delineate the circumstances where Jack Pardue was the victim of outrageous governmental conduct but Michel was not.

The Government created Danzer as a convincing "hitman" with people to answer to who might even kill him. The Government used this clear implied threat against Jack and Michel to get them to do what they wanted so they could indictment. *Compare United States v. Szycher,* 585 F.2d 443, 449 (10th Cir.1978) (evidence of implied threat did not measure up; defendant was "impressed" with government agent and tried to be friends with him). *See also* Marcus, *The Due Process Defense in*

Entrapment Cases: The Journey Back, 27 AM.CRIM.L. REV. 457 (1990).

C.

On this score, the decision below is contrary to *United States v. Twigg*, 588 F.2d 373 (3d Cir.1978). *See* Marino, *Outrageous Conduct: The Third Circuit's Treatment of the Due Process Defense*, 19 SETON HALL L.REV. 606 (1989).

D.

The Court should grant certiorari to resolve the question of whether implied threats violates "fundamental fairness" or the "universal sense of justice" or is otherwise "intolerable" under the Due Process Clause. In the eye of the beholder of what the Government is doing, he cannot do anything but go along. Our Government should not be permitted to charge and then convict a person whom it has drawn into and then made stay in its conspiracy by its own implied threats.

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.
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> * * *
>
> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipre-

sent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law until himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[9]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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May 17, 1993

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[9] *Olmstead v. United States*, 277 U.S. 438, 479, 485 (1927) (Brandeis, J., dissenting).